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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

MONON RAILROAD,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT, MONON RAILROAD.

OPINIONS BELOW.

The majority opinion and the dissenting opinion of the District Court denying appellant an injunction and affirming the order of the Interstate Commerce Commission (Commission) are not yet reported.*

* Because of the volume involved, the District Court opinions and the Commission's report are set forth in a separately bound volume filed by Illinois Central Railroad Company on behalf of all appellants (hereinafter referred to as "App.").

JURISDICTION.

This is an appeal taken, pursuant to 28 U. S. C. § 1253, from the judgment of a three-judge District Court, dated August 4, 1966, which court, by a two to one majority, affirmed the order of the Commission herein, and denied Monon Railroad's (Monon) prayer for an injunction restraining the enforcement of said order.

STATUTES INVOLVED.

Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2), provides in part as follows:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> "(i) * * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *.
>
> "(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable; * * *"

The Administrative Procedure Act provides in part (5 U. S. C. § 1007(b)):

> "* * * All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the ma-

terial issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. * * *"

QUESTIONS PRESENTED.

The majority opinion of the District Court in affirming the Commission's order stated (App. p. 26a):

> "The Commission appears to have decided, *as it was required to do,* the question of the ultimate desirability of the L&N control of the Evansville Line." (Italics ours.)

The court, although thus recognizing that the Commission had decided the "ultimate desirability" of the L&N control of the Evansville line, nevertheless held that the Monon is not entitled to consideration by the Commission of its evidence and objections, nor to findings and conclusions of the Commission thereon, in the current proceeding because there will be a later proceeding under Section 5(2) of the Act to approve the details of said acquisition, at which time it is asserted that the Monon can again raise its objections (App. pp. 26a, 27a) and apparently again present its evidence.

The questions presented are:

1. Did the District Court err in holding that the Commission need not make findings with respect to the injury to the Monon which would result from a condition imposed by the Commission in its order?

2. May the Commission in a proceeding under Section 5(2) of the Interstate Commerce Act (the Act), 49 U. S. C. § 5(2), determine that public interest requires the acquisition of a line of railroad by the Louisville and Nashville Railroad Company (L&N) despite the failure of the Commission to make any findings as to the objections, evidence and contentions of damage to Monon as a competing railroad?

3. May the Commission find that such a transaction is consistent with the public interest as set forth in Section 5(2) of the Act when the Monon, as a competing railroad, will be damaged thereby so as to impair or endanger its continued operation and existence?

4. Has not the Commission, in finding said acquisition "would be consistent with the public interest" (App. p. 57a) as required under 5(2) (b) of the Act, made a final determination of that issue without making requisite findings of fact and will not the Monon thereby be foreclosed from again raising this issue (which issue is vital to Monon) in any later proceeding under Section 5(2) of the Act?

5. Has the Commission, in ignoring the Monon's evidence, complied with its duty to accommodate a proceeding under Section 5(2) of the Act with the antitrust laws of this nation as required by the decisions of this Court?

STATEMENT OF THE CASE.

The Commission's decision and order authorized the Missouri Pacific Railroad Company (MoPac) to obtain control of the Chicago and Eastern Illinois Railroad Company (C&EI; also referred to as Eastern by the Commission) on condition that after obtaining such control MoPac would cause the C&EI to sell its Evansville line to the L&N. Monon's evidence showed that if L&N were permitted to acquire the Evansville line Monon would lose $1,800,000 per year in gross annual revenues (App. p. 166a) out of a total of $18,000,000 gross annual revenues. Although this evidence was challenged by the L&N, the L&N admitted the Monon would lose $566,793 per year in gross revenues (Transcript (Tr.) 5526, 5527, 5541, 5556 and 5558) and on cross-examination admitted that in addition some traffic of the Southern Railroad Company (Southern) now moving from the south of the United States to

Chicago via Southern-Monon would be diverted to L&N (Tr. 5541). No finding was made by the Commission on any of this evidence.

For the years involved (1959 to 1961), the C&EI had almost twice the gross revenue of the Monon ($104,785,000 (App. p. 105a), as compared with $56,766,812 of Monon revenue (Exhibit H-160)). For the same years, the C&EI sustained a net income loss of $336,000 (App. p. 105a) while the Monon sustained a loss almost seven times as great, viz., $2,147,749 (Exhibit H-160).

Monon's evidence showed that with the necessary reduction of through trains and other service reductions it could not continue to attract overhead freight from other railroads. Such reduced service would increase detention time on freight cars causing a shortage of cars in critical periods. Maintenance, new equipment purchases and rehabilitation would have to be deferred. Adding this loss of revenue, after such economies, to the existing operating deficit would deplete cash to the point that the payroll could not be met eighteen months thereafter (Examiner's Report pp. 95, 96). This evidence was uncontroverted. No finding was made by the Commission upon it.

The majority decision of the District Court held (App. pp. 26a, 27a) that while the Commission was required to decide and has decided "the ultimate desirability of L&N control of the Evansville Line," the question of competitive effect upon the Monon need not be decided herein because the order only requires compulsory negotiations and, therefore, Monon "Will have ample judicial protection" in the later 5(2) proceedings approving such negotiations, at which time Monon can raise its objection. As noted below, no such protection exists. The court in holding that it would not pass upon the sufficiency of the findings, as to the injury to the Monon, observed that the general findings to the effect that L&N's competitors (without naming the

Monon) would not be significantly injured were probably enough citing *McLean Trucking Co.* v. *U. S.* (1944), 321 U. S. 67, 87, 88. *McLean,* however, is totally inapplicable. In the present case, there were no specific findings as to the Monon whereas in *McLean* extensive specific findings were made (321 U. S. 67 at pages 88 to 90).

Chief District Judge Campbell, in dissenting, stated (App. p. 33):

> "Also, *the Monon's evidence, heretofore ignored by the Commission,* should be heard and a finding should be made as to what effect, if any, the Commission's present ruling will have on the Monon—L&N dispute. The intended scope and extent of the Commission's directive, if renewed, that the Missouri Pacific negotiate the sale of what has been referred to as the Evansville line to the L&N should be made more exacting and definitive. Necessarily, the effect of this directive on the Monon or on a subsequent § 5(2) application should be spelled out. * * *". (Italics ours.)

THE QUESTIONS ARE SUBSTANTIAL.

I.

The Commission found that control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line (App. 67a, 68a, 92a). That condition is thus an essential predicate for Commission approval.

The Monon presented evidence to show that such an operation by the L&N to Chicago would seriously impair the ability of the Monon to compete. The Commission, in violation of the Administrative Procedure Act, 5 U. S. C. 1007 (b), failed to make any findings as to Monon's evidence or objections. As dissenting Chief Judge Campbell observed, Monon's evidence was ignored (App. p. 33a). Specific findings are a basic prerequisite to the validity of

a Commission order and mere general conclusions are insufficient. *Burlington Truck Lines* v. *U. S.* (1962), 371 U. S. 156, 167, et seq.

A merger or acquisition of one railroad by another railroad is against the public interest if a competing railroad is thereby seriously injured. In *Chicago, Burlington and Quincy Railroad Company Control,* 271 I. C. C. 63, 157, the Commission stated:

> "We have approved transactions found to be desirable and necessary in the public interest notwithstanding the prospective loss of some revenue by competing carriers. *We have not done so, however, where the proposed transaction would endanger or impair the operations of other carriers contrary to the public interest.*" (Italics ours.)

Thus, the Commission's own criteria require a specific finding on the Monon's evidence in this case. Apparently, "public interest" in this regard has never been passed upon by this Court.

II.

The majority opinion seems to establish a new principle, viz., that an agency can determine an issue without findings and avoid judicial review thereof so long as there may be later proceedings as to some subsidiary or supplemental question. Such a principle would defeat judicial review. It would permit issues of substance to be determined without findings, provided trivial issues are left open for later determination. It would violate the repeated adjurations of this Court that there must be an end to litigation and that piecemeal litigation is to be abhorred. Monon has for over five years engaged in this litigation only to be told that it now must start all over in a later proceeding despite the acknowledgment of the District Court that the "ultimate desirability" of the L&N acquisition *has already been determined* by the Commission herein (App. p. 26a).

The later proceeding that the District Court envisions as a protection to the Monon is limited to the negotiation of the purchase of the Evansville Line by the L&N from the C&EI. The Commission stated (App. p. 57a), that it was setting up a "mechanism" to effect the purchase by requiring compulsory negotiations with a later proceeding to approve the sale or lease so negotiated. The Commission acknowledged (App. p. 56a) that the second proceeding will evaluate the details of the transaction, including the price to be paid. These are essentially private negotiations between two railroads over details not involving the Monon. Under 49 U. S. C. § 5(2)(b), the Commission is authorized to dispense with hearings. That there may not be a later hearing is confirmed by the Commission's brief filed in the District Court wherein in alluding to the later Section 5(2) proceeding it was stated: "(with *the possibility* of further hearing)." (Italics ours.)

It is to be noted that neither the Commission nor the District Court suggests that there should be negotiations *with the Monon,* and yet the most vital interests and even the continued existence of the Monon may, according to the District Court, be determined by the outcome of such negotiations.

III.

The Illinois Central Railroad and the Chicago and North Western Railway also claimed competitive injury to them. A whole section of the Commission Report involving over five pages and entitled "*Diversion of Traffic*" (App. pp. 49a to 54a), is devoted to a detailed explanation of why those railroads will not be injured. The Monon was not mentioned in the Commission's review of this issue, yet the Commission devoted pages (App. pp. 55a, 56a) to answering a minor contention of the Monon on another point. The specific findings afforded to these two rail-

roads on the question of competitive injury by diversion of traffic are the findings to which the Monon is entitled under the statute and previous decisions of this court. *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 167.

IV.

The Commission decision and order established the immediate right in the L&N (App. p. 68a) to provide service over the Evansville Line on a temporary basis pending final acquisition. Such interim use of this line will result in grievous injury to the Monon by diversion of its traffic, and such an injury should be subject to judicial review. Yet the judgment of the District Court, in disregard of the lack of requisite findings by the Commission, affirms this part of the Commission's order, effectively denying such review. Further, after the MoPac has acquired control of additional stock, after the L&N has been using the Evansville Line, and has thereby effectively eaten away the Monon's traffic, and after the acquisition has been completely negotiated it is almost facetious to contend that the Commission will be able to unravel everything that has gone before so that Monon will receive the impartial hearing to which it is entitled.

V.

The District Court has reached a conclusion as to the Monon which is neither mentioned, considered or explained by the Commission. Such appellate procedure was rejected in *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196, where this court held that a Commission determination must be reviewed by the court on the grounds invoked by the agency, and if the grounds are inadequate or improper, it cannot supply a proper basis without the reviewing court projecting itself into a domain restricted by Congress to the agency. Further, the basis of the agency

determination must be set forth with clarity. In *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 168, 169, it is stated:

> "* * * The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: * * *."

The District Court opinion is inconsistent and in error because it failed to heed this court's above quoted admonition. The District Court, in holding that the Commission determined the "ultimate desirability" of the L&N's acquisition of the Evansville Line (App. p. 26a), could only mean that the acquisition is in the public interest. This is a final determination and is so treated by the District Court. Yet, the court stated that the only issue decided is whether "compulsory negotiations" are warranted and added that mere negotiations between the two railroads will have no competitive effect upon the Monon. It is not the negotiations to which the Monon objects—it is the right and authority to enter into those negotiations, which right and authority the Commission, without affording Monon a hearing, has determined are in the public interest. Monon's injury if this acquisition is permitted will be precisely the same regardless of the price paid and the other details to be later negotiated and approved.* The court's statement that the Monon can raise its objections in the later 5(2) proceeding (App. p. 27a) is in direct conflict with the Court's statement that the public interest issue has already been determined. Further, how can the District Court grant Monon "ample judicial protection" as to an issue already disposed of herein?

Significantly, the Commission at no time indicated that Monon could ever again raise the public interest issue, or

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* A permissive Commission order is as reviewable as a mandatory order, *B. & O. R. Co.* v. *U. S.*, 264 U. S. 258, 263, 264.

that Monon would be given a further opportunity to raise the issue in the later Section 5(2) proceeding or that Monon would be protected in the later Section 5(2) proceeding as stated by the District Court. The Commission's failure to make findings is excused by the Court on the ground that evaluation of the competitive effect of the L&N operation over the Evansville line could come in a subsequent proceeding. However, there was no evidence before, and there were no findings by, the Commission that such evaluation could be made later and the Monon thus protected. On the contrary, the Commission's statements as to the scope of the subsequent purchase proceedings do not permit the later consideration of this issue.

VI.

As the record now stands, Monon will be denied a hearing in these proceedings and yet will be bound later under the theory of *res judicata* because a final determination has been made as to the public interest issue. An agency's determination, upon judicial review, is subject to the rules of *res judicata* the same as if private litigants were before the court. *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U. S. 335, 340; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476, 477; *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, 401 et seq.

VII.

A serious question exists as to the violation of the antitrust laws, which question the Commission has failed to consider. In *Seaboard Airline R. Co.* v. *U. S.* (1965), 382 U. S. 154, 156, this court stated:

> "We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1945), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173 (1959). As we said in *Minneapolis*, at 186:

> "'Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws." 321 U. S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy".' 321 U. S., at 87.
>
> "The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads *if it makes adequate findings in accordance with the criteria quoted above* that such a merger would be 'consistent with the public interest.'" (Italics ours.)

The Monon has contended throughout that this acquisition violates the antitrust laws. No findings have been made as to this contention. This order, therefore, "ignores" the antitrust laws and fails to make any accommodation of Section 5(2) with the antitrust laws.

Monon has been summarily dismissed as inconsequential by the Commission and the District Court in this control proceedings involving two railroad giants and the C&EI, which is twice the size of the Monon. To further strengthen these Goliaths to the serious damage of Monon, its exclusive shippers and those cities and villages relying exclusively on the Monon for service not only offends the basic concept of fair play but the serious weakening and possible destruction of the Monon Railroad violates the public interest requirement of Section 5(2) of the Act and the antitrust laws.

VIII.

Monon adopts the additional questions set forth in the Jurisdictional Statement of the Illinois Central Railroad Company as though fully set forth herein.

CONCLUSION.

The questions here presented are of utmost importance because of the many pending mergers of railroads in which numerous conditions have been imposed by the Commission. The District Court's opinion, if left unchanged, can only result in confusion as to the status and validity of such conditions. Authorization of MoPac's control of the C&EI was specifically conditioned on L&N obtaining the Evansville Line (App. pp. 67a, 68a, 92a). If the public interest issue is still open to Monon, as the District Court has held, then MoPac's authorization cannot be final because MoPac's authority is predicated on L&N obtaining the Evansville Line. If MoPac's authority is deemed final, the public interest issue has been disposed of as to Monon without a hearing. The District Court held that the public interest issue had been determined and yet held that the Monon could raise it later. This confusion can only be eliminated by a return to The Administrative Procedure Act (5 U. S. C. § 1007(b)) and the previous decisions of this Court, both of which require basic findings as to any condition imposed. Monon respectfully requests that probable jurisdiction be noted and the decision below be reversed.

Respectfully submitted,

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Of Counsel:
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APPENDIX I.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY., *Plaintiff and Intervening Plaintiffs,* *vs.* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON, *Defendants and Intervening Defendants.*	No. 65 C 1393

DECREE.

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892 and 21980 on February 16, 1964, be, and it is hereby, affirmed.

ENTER:

ELMER J. SCHNACKENBERG,
Circuit Judge.

BERNARD M. DECKER,
District Judge.

DATED: August 4, 1966.